NO. 48888-4-II

IN THE COURT OF APPEALS OF WASHINGTON STATE

DIVISION II

STEVEN P. KOZOL, LARRY BALLESTEROS,
KEITH CRAIG, AND KEITH BLAIR,

Appellants,

v.

JPay, Inc., a foreign corporation,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
THE HONORABLE MARY SUE WILSON

OPENING BRIEF OF APPELLANT STEVEN P. KOZOL

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- ORIGINAL-

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I. INTRODUCTION

When customers purchase products from a company, the company's subsequent actions cause injury to the customers' purchases, and the company falsely represents that the only remedy available is for the customer to purchase more of the company's products, such unfair or deceptive acts violate the Consumer Protection Act.

When a company's actions cause injury to its customers' purchases and the company repeatedly rejects the customers' multiple demands for a remedy, the customers' injuries under the Consumer Protection Act are not vitiated simply because after suit was brought the company finally decided to provide a remedy.

Where a party responding to a motion for summary judgment dismissal establishes that it requires a CR 56(f) continuance and an order to compel discovery to obtain specific evidence that will create a genuine dispute of material fact, the trial court abuses its discretion when it denies the motion for continuance and motion to compel, but then grants summary judgment dismissal due to the non-moving party's failure to present the same necessary evidence it sought to raise a genuine issue of fact.

When an out-of-state defendant objects to a notice to appear for in-state depositions because it would be "unduly burdensome and expensive" for its CR 30(b)6) designees to travel to Washington, yet the defendant at approximately the same time

then has four employee representatives appear in Washington for another company purpose, such false objections should not be a basis to avoid deposition attendance.

Under the Uniform Declaratory Judgment Act, a plaintiff can have determined its rights as a third-party beneficiary to a contract.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in granting summary judgment dismissal of Appellants' Consumer Protection Act and injunctive relief claims.

Assignment of Error No. 2: There was insufficient evidence by Respondent to establish an absence of a genuine issue of material fact as to Appellants' intentional tort claims.

Assignment of Error No. 3: The trial court erred in granting summary judgment dismissal of Appellants' intentional tort claims.

Assignment of Error No. 4: The trial court erred in finding the Appellants could not be entitled to damages.

Assignment of Error No. 5: The trial court erred in granting summary judgment dismissal of Appellants' Uniform Declaratory Judgment claims.

Assignment of Error No. 6: The trial court erred in denying Appellants' motion for CR 56(f) continuance and motion to compel discovery.

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III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

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Issue No. 2: Did Appellants' issues and evidence on reconsideration raise genuine issues of material fact precluding summary judgment dismissal?

IV. STATEMENT OF THE FACTS

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts all facts presented in Section IV of the Opening Brief of Appellants Ballesteros, Craig and Blair.

V. PROCEDURAL HISTORY

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the procedural history presented in Section V of the Opening Brief of Appellants Ballesteros, Craig and Blair.

VI. ARGUMENT

A. Standard of Review on Summary Judgment and Reconsideration

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section VI(A) of the Opening Brief of Appellants Ballesteros, Craig and Blair.

B. The Trial Court Erred In Granting Summary Judgment Dismissal of Appellants' Consumer Protection Act Claims

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section VI(B) of the Opening

Brief of Appellants Ballesteros, Craig and Blair.

C. JPay's Evidence Was Insufficient To Support Summary Judgment Dismissal of Intentional Tort Claims

Pursuant to RAP 10.1(g), Appellant Kozol hereby incorporates and adopts the arguments presented in Section VI(C) of the Opening Brief of Appellants Ballesteros, Craig and Blair.

D. The Trial Court Erred In Granting Summary Judgment Dismissal of Appellants' Conversion Claims

The trial court granted summary judgment dismissal of Appellants' conversion claims because it found there was no injury or damages for the claim, and that the Appellants could still have had access to their digital music purchases if they had secured or purchased a newer model device from JPay. RP 41-42. Again, the trial court misapprehended the requirements to establish an injury and damages under this intentional tort.[3]

"Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." In re Marriage of Langham, 153 Wn.2d 553, 564, 106 P.3d 212 (2005). "Conversion is the wrongful exercise of dominion over the property of another." Kelley v. Mort Elec. Regis. Sys., 642 F.Supp.2d 1048, 1056-57 (D.C. Cal. 2009). A chattel is an article of personal property; it includes tangible goods or intangible rights. Langham, at 564.

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[3] Appellants' showing of available damages under the intentional torts is addressed in a separate section in this briefing.

1. Initial Conversion of Appellants' Chattel

On summary judgment Appellants contended that they would be able to obtain evidence to create a genuine dispute of fact as to whether JPay intentionally "malfunctioned" or "deactivated" their JP3s, and thus a genuine issue as to whether JPay's software update accidentally unassigned the JP3s as JPay purported. CP 256-259. To obtain this material evidence, Appellants moved for a CR 56(f) continuance, and moved for an order to compel discovery.[4] CP 124-130.

Wrongful intent is not an element of conversion, and good faith is not a defense. Paris Am. Corp. v. McCausland, 52 Wn.App. 434, 443, 759 P.2d 1210 (1988). "Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action [in conversion]." In re Marriage of Langham & Kolde, 153 Wn.2d at 560 (quoting Judkins v. Sadler-MacNeil, 61 Wn.2d 1, 4, 376 P.2d 837 (1962)).

As such, even though it has yet to be determined whether JPay intentionally "locked" and "unassigned" Appellants' JP3s, or whether this was inadvertently caused by deficient software, there is no need to prove wrongful intent, negligence, nor knowledge as to JPay's actions to support the conversion claims. JPay purported that it was the company's intentional installation of a software update that somehow caused the effects upon

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[4] The court's denial of these two motions is addressed elsewhere in this briefing.

Appellants' JP3s. CP 86. This is a requisite intentional act. It is undisputed that the JPay software transferred the ownership of Appellants' JP3s to be "Property of JPay." CP 9, 268-270, 310-312, 318-320, 321-322. It is undisputed that the JPay kiosk software notified Mr. Kozol that he no longer owned a music player. CP 26-34.

Even though the Appellants could still physically hold their JP3 devices in their hands, JPay executed a digital conversion of the devices by "locking" them, "unassigning" them, "deactivating" them, and rendering them unable to sync or be recognized by the JPay kiosk system. Appellants' JP3s were rendered nothing more than mere pieces of plastic. Appellants could not use their purchased video games, F.M. radio, nor could they listen to their purchased music installed onto the JP3s.

Further, now that Appellants' JP3s were registered as "Property of JPay - Unassigned," the prison staff could simply confiscate the JP3s as contraband at any time, since the factory-installed "Player Security Function" of each Appellant's ownership information no longer existed on the devices. CP 429-430. The JP3s are "preloaded with the offender's name and ID so when the player boots up, the offender name and ID appear notifying DOC staff of ownership." CP 433. This actually happened to Appellant Kozol, who had his "locked" JP3 seized in a cell search for contraband. CP 75.

Accordingly, there was a genuine issue of fact precluding summary judgment as to whether there was an injury.

The merit of Appellant's argument is made more clear by using an example of an analog conversion: Suppose Person A buys a car from Person B and brought it home and parked it in his driveway. Person B warranteed the car to Person A for 12 months. The car's registration paperwork showed the car was registered/licensed to Person A. Thirteen months later, Person B types up a new set of registration papers, files them with the State, then goes to Person A's house uninvited, and in the middle of the night swaps out the registration papers in the glovebox to now show that the car belongs to Person B, and then changes the locks on the car so Person A cannot open the car, cannot start the car, and cannot functionally use it in any way.

Under the law this would clearly be a conversion of the car. While Person A could walk out to his driveway and physically touch the car,[5] it was effectively nothing more than a 3,000-pound lawn ornament. Despite being the purchaser, Person A could not open the car, nor start the car, nor could he even sell the car. Yet this is essentially the same thing that JPay did in its digital conversion of the Appellants' JP3 devices.

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[5] At least until such time as when it may be the subject of a repossession, which was the similar plight Appellants faced, who could have had their JP3s seized by prison staff at any time; and in fact this happened to Kozol.

While such an analog example would clearly be a pyhsical conversion of ownership or dominion, a newer form of digital conversion is no less injurious. Interference with digital ownership or dominion over a person's chattel -- a "digital" conversion -- still results in the "wrongful exercise of dominion over the property of another." Kelley, 642 F.Supp.2d at 1056-57.

A "digital" conversion can occur when there is a physical electronic device or piece of hardware that is merely a vessel and a physical interface to use for accessing software functions and digital data/media stored on the device. Because the sole purpose of the physical device is to enable use of the digital data/media via a software operating system, there is a cognizable ownership interest in the data/media being stored on the physical device, as well as with the device itself. This is the same principle that makes it a crime for someone using a close proximity R.F.I.D. or a hacking device to copy or "clone" (i.e., steal) data from someone else's smart phone or credit card.

The ownership interest and control of the digital contents or media on a device is just as established as that of the physical device itself. Therefore, one way a digital conversion occurs is when there is unwarranted interference with the dominion and control over digital content or media by digitally locking the physical device. Here, JPay "locked" and "unassigned" the Appellants' JP3s, and rendered then "Property of JPay." This was unwarranted interference with the device and the content,

disabling its ability to function. This "digital" conversion injured the Appellants.

2. Continuing Conversion of Appellants' Chattel

JPay was not entitled to summary judgment on the conversion claims because JPay's continuing refusal to restore Appellants' dominion over their chattel renders JPay liable for conversion. Under this specific continuing conversion claim it is irrelevant whether JPay intentionally "locked" the JP3s, or if the JPay software inadvertently caused this injury. Instead, this continuing conversion turns on the undisputed facts that Appellants notified JPay that its kiosk software had "locked" and "unassigned" their JP3s which completely divested the Appellants of registered ownership and effective use of the device or its contents, and JPay intentionally refused the Appellants' numerous and continuing demands to relinquish digital dominion and control over their chattel. This intentional refusal is a conversion, as a matter of law.

"A converison may be committed by intentionally...(g) refusing to surrender a chattel as stated in §§ 237-241." RESTATEMENT (Second) OF TORTS, § 223 (1965). "One in possession of a chattel as bailee or otherwise, who on demand, refuses to surrender its possession to another entitled to the immediate possession thereof, is liable for its conversion." Judkins v. Sadler-MacNeil, 61 Wn.2d 1, 5, 376 P.2d 837 (1962).

Conversion "rests neither in the knowledge nor the intent of the defendant." Judkins, 61 Wn.2d at 3-4 (quoting Poggi v. Scott, 167 Cal. 372, 139 P. 815, 816 (Cal. 1914)). Instead, it rests on "the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results." Id., at 4. "Where a person entitled to possession demands it, the wrongful, unjustified withholding is actionable as conversion." CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1145 (9th Cir. 2010).

Here, JPay took complete control over Appellants' JP3 devices and the contents, stating they were "Property of JPay." Further, JPay expressly notified Mr. Kozol that he no longer owned a JPay music player. Appellants submitted multiple help tickets, demand letters, and filed a lawsuit to regain digital dominion over their chattels. CP 436, 442-446, 313-318, 212. JPay initially refused multiple demands from Appellants. This created a continuing conversion. After being sued JPay then offered sub-standard replacement (JP4) devices that were being discontinued, which Appellants declined. JPay continued to refuse to return the digital dominion and ownership of the Appellants' JP3s and the contents, and then after several more months provided defective "refurbished" JP3 players that had corrupted data files "pre-loaded" by JPay, which would not sync with the JPay kiosk and would not allow Appellants to access/download their purchased music. Appellants were still being deprived of their digital chattel. CP 160-161, 220.

The facts viewed in the light most favorable to Appellants show that something in the JPay system exercised "unwarranted interference" with the digital "dominion over the property of the plaintiffs," Judkins, 61 Wn.2d at 4, which directly divested or interfered with the Appellants' ownership, possession, or use of thousands of dollars worth of their rightful property, converting the chattel to be "Property of JPay." JPay continually refused Appellants' demands for it to reactivate their JP3 devices, and refused to relinquish digital dominion and control over their chattel.

Many months later, JPay miraculously did something it previously said could not be done, and offered refurbished JP3s to Appellants, but these used devices would not work due to more corrupted data files JPay installed. JPay still refuses to unlock or otherwise reactivate the Appellants' JP3s, even though the evidence shows the ability to unlock, reset or reformat the JP3s has always been available for JPay to execute for DOC inmates. CP 327-330. And of significant importance is the fact that JPay can "unlock" its media devices for an inmate who is releasing to go home (CP 432, 171), but incarcerated inmates are given no such customer service and have to purchase more JPay product. Appellants' JP3 devices currently sit in the custody of their attorney, awaiting injunctive relief of being unlocked and reactivated by JPay.

E. The Trial Court Erred In Granting Summary Judgment Dismissal of Trespass to Chattels Claims

The trial court granted summary judgment dismissal of Appellants' trespass to chattels claims because it found there was no injury or damages under the claims, and that the Appellants could have mitigated their damages if they secured or purchased a newer model JP4 or JP5 device. RP 41-42. Again, the trial court misapprehended the requirements to establish an injury and damages under this intentional tort.[6] If JPay's actions did not amount to a conversion in this case, then in the alternative its actions clearly rise to a trespass to chattels.

Trespass to chattels may occur when a person intentionally uses or intermeddles with a chattel in the possession of another. RESTATEMENT (Second) OF TORTS, §217 (1965). A person will be liable to the possessor of the chattel only if:

> "(a) he dispossesses the owner of the chattel, or (b) the chattel is impaired as to its condition, quality or value, or (c) the possessor is deprived of the use of the chattels for a substantial time, or (d) bodily harm is caused to the possessor or harm is caused to some person or thing in which the possessor has a legally protected interest."

RESTATEMENT, §218.

Under its unproven theory, JPay speculated that when it intentionally installed JP4 software updates to the kiosk system shared with the JP3s, it caused the JP3s of some customers to "malfunction" and no longer operate. Conversely, the Appellants' evidence strongly indicates that JPay may have intentionally

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[6] Appellants' showing of damages under the intentional torts is addressed elsewhere in this briefing.

"malfunctioned" their JP3s. But even under the scenario speculated to by JPay, there still existed an intentional act -- JPay's installation of a software update -- and intent to deprive is not needed to be proved by the Appellants for a trespass to chattels. If the facts viewed in the light most favorable to Appellants do not create a genuine issue of material fact as to a conversion or continuing conversion having occurred, then in the alternative there is no question that JPay's digital interference amounts to a trespass to chattels.

Under the four enumerated criteria in the Restatement, there is no question that Appellants at a minimum were "deprived of the use of the chattel for a substantial time." And converting the JP3s to be "Property of JPay" and telling Mr. Kozol that he no longer owned a JPay music player and as such could not access his purchased music, video games or F.M. radio, clearly "dispossess[ed] the other of the chattel." Restatement, §217, 218. And if JPay's assertions are true that the Appellants' JP3s cannot be unlocked, reformatted or refurbished to regain operation of the device, then the intentional installation of the software update that JPay purported to be the cause of the JP3s locking up established that "the chattel is impaired as to its condition, quality or value." Id., §217, 218.

Not only did it take approximately 50 days for JPay to even begin to offer replacement JP4s (which, as deficient, discontinued models were not viable or fair alternatives), and only **after**

Appellants had to resort to litigation, but JPay has continually been notified that it is interfering with Appellants' use of their purchased chattel -- including providing defective JP3 replacements and not permitting the JP3s to sync with the kiosk -- and still has not ceased its digital interference. Instead, JPay provided Appellants with defective "refurbished" JP3 devices which did not restore their ability to fully use their purchased music and JP3 devices. CP 160-161, 220; RP 18-19.

Viewing the facts in the light most favorable to the Appellants, a genuine issue of material fact exists as to whether JPay is liable for trespass to chattels. Accordingly, JPay was not entitled to summary judgment dismissal of the claim.

F. A Genuine Issue Of Material Fact As To Damages Precluded Summary Judgment Dismissal

The trial court granted summary judgment dismissal of Appellants' claims based upon a finding that there could be no showing of damages under any claim. Because there is a genuine issue of fact as to the existence of damages, summary judgment was precluded.

1. Damages Under Consumer Protection Act Claims

Under the Consumer Protection Act, Washington courts have disallowed recovery of emotional distress damages under a statute that affords "actual damages." See Segura v. Cabrera, 179 Wn.App. 630, 645, 319 P.3d 98 (2014). However, Appellants properly did not seek emotional distress damages under their CPA claims. Instead, the Appellants are entitled under the CPA to recover

actual damages sustained by them, which is the complete monetary amount spent on each of their JP3 players and music downloads. RCW 19.86.090. Further, "the Court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained." RCW 19.86.090. Here, Appellants spent thousands of dollars with JPay that has been affected by JPay's unfair or deceptive trade practices. CP 8-9, 160, 214, 219, 223.

Because the Appellants require a CR 56(f) continuance to establish whether JPay intentionally sent a software command to lock up their JP3 devices to force them to purchase more JPay products, if they establish such an intentional act, this would serve as an aggravating factor to be considered in determining any appropriate punitive treble damages awardable under RCW 19.86.090. Because the undisputed facts support that JPay's actions were unfair or deceptive, and that their acts caused Appellants to be deprived of the value and use of these purchased products, actual damages are shown and treble damages are available under the CPA.

2. Damages Under the Intentional Torts

Under either claim of conversion, continuing conversion, or trespass to chattels, Appellants are entitled to seek emotional distress damages as a matter of law. "[E]motional distress damages have always been available upon proof of an intentional tort." Broughton Lumber Co. v. BNSF Ry., 174 Wn.2d 619, 636,

278 P.3d 173 (2012); see Nord v. Shoreline Savings Ass'n, 116 Wn.2d 477, 482, 805 P.2d 800 (1991); cf. Schmidt v. Coogan, 181 Wn.2d 661, 671, 335 P.3d 424 (2014)("reluctance to award emotional distress damages absent an impact in negligence cases contrasts starkly to emotional distress damages for intentional torts.").

Here, while there is a genuine issue of fact precluding summary judgment dismissal of the conversion or trespass to chattels claims, in the event Appellants obtain summary judgment or a verdict as to JPay's intentional tort liability there would be the availability of emotional distress damages to be decided by a jury, as the appropriate jury demand was filed. CP 542.

Summary judgment requires the courts to view all the pleadings, affidavits, depositions, admissions, and reasonable inferences in favor of the non-moving party. Ellis, 142 Wn.2d at 458. To establish damages there had to be a showing that one or more of the Appellants suffered emotional distress. Such distress could include being very upset, traumatized, experiencing sleeplessness, physical unrest or upset stomach, anxiety, depression, and the other emotions suffered under JPay's conduct. "These emotions would constitute emotional distress." Sutton v. Tacoma Sch. Dist. No. 10, 180 Wn.App. 859, 872, 324 P.3d 763 (2014)(citing Kloepfel v. Boker, 149 Wn.2d 192, 203, 66 P.3d 630 (2003)).

Appellant Kozol plead emotional distress in his verified complaint. CP 10 (¶ 4.11), 14, 15. Mr. Kozol also testified to his emotional distress on summary judgment. CP 270-272 (¶ 15).

Other Appellants plead their emotional distress in their verified complaint. CP 543-554. JPay did not file any answers, did not deny these averments, and failed to file any countervailing evidence. On reconsideration, new evidence established that in the days since summary judgment was granted, Appellants experienced emotional distress from JPay's continuing conversion and trespass to chattels. CP 164 (¶ 16), 215 (¶ 4), 220-221 (¶ 3), 224 (¶ 3). All this evidence makes the necessary showing of emotional distress to establish damages under the tort theory.

Instead of presenting evidence, JPay merely argued that Appellants were required to provide medical evidence of their emotional distress by way of "testimony of a medical expert diagnosing Plaintiff's claimed personal injuries and opinion as to their cause(s)," and that the damage claims "have no legal basis under any cause of action." CP 109. To the contrary, the law is clear that Appellants do not have to prove by medical diagnosis that they have suffered emotional distress as a result of JPay's tortfeasance.

In Kloepfel v. Boker, 149 Wn.2d 192, 66 P.3d 630 (2003), the Supreme Court held that a plaintiff is not required to prove objective symptomotology for emotional distress damages caused by an intentional tort. The Court clearly distinguished these damages by an intentional tort from those for the separate tort of negligent infliction of emotional distress - where the emotional distress "must be susceptible to medical diagnosis" and must "constitute a diagnosable medical disorder." Id., at 196-197.

Accordingly, objective symptomotology is not required to establish emotional distress under a claim for an intentional tort. Id., at 198. As is well established, the Supreme Court "has liberally construed damages for emotional distress as being available merely upon proof of 'an intentional tort.'" Birchler v. Castello Land Co., 133 Wn.2d 106, 116, 942 P.2d 968 (1997) (emphasis added) (quoting Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986)). Therefore, upon proving JPay's liability for the intentional torts Appellants are entitled to seek emotional distress damages as a matter of law.

Additionally, for the purposes of damages preexisting mental distress must be considered under the "eggshell plaintiff" rule. Under the rule, "a tortfeasor takes his victims as he finds him, and must bear liability for the manner and degree in which his fault manifests on the individual physiology of the victim." Buchalski v. Universal Marine Corp., 393 F.Supp. 246, 248 (W.D. Wash. 1975). "[T]he rule imposes liability for the full extent of those injuries, not merely those that were foreseeable to the defendant." Benn v. Thomas, 512 N.W.2d 537, 539-40 (Iowa 1994). The eggshell plaintiff rule is well settled in Washington law. See, e.g., Reeder v. Sears, Roebuck & Co., 41 Wn.2d 550, 556-57, 250 P.2d 518 (1952).

On summary judgment Mr. Kozol's declaration established that he had the preexisting emotional distress of being wrongfully imprisoned and factually innocent of the crimes he is incarcerated for. CP 270-272 (¶ 13). JPay failed to refute this.

Further, on reconsideration, Appellants Kozol and Ballesteros each presented new declaration evidence that they had preexisting emotional distress. Mr. Ballesteros submitted new evidence that he had just been formally diagnosed with Post Traumatic Stress Disorder (PTSD) that he had been suffering from for decades.[7] CP 220. Mr. Kozol presented new evidence that in the time since summary judgment was granted to JPay, he was experiencing additional emotional distress that is "even more heightened because of the underlying stress and anxiety of being wrongfully convicted and imprisoned for 16 years now, and the constant battle to work towards my exoneration," which in the days after summary judgment he is "having to endure on a daily basis." CP 164 (¶ 16).

In fact, JPay has already acceded to Appellants' emotional distress by stating that "JPay has no doubt that an inmate's [JP3], including such device's ability to play music, is important to inmates." CP 296-298 (Answer to 5th Requests for Production). Additionally, Mr. Kozol's unrefuted evidence established the consequential damages he sustained from being precluded from completing music projects which he and his family were using to raise money to pay for attorneys to effectuate his exoneration. CP 161-164, 199-210.

JPay could not establish an absence of damages, and thus was not entitled to summary judgment of the intentional tort

[7] On appeal Mr. Ballesteros moved under RAP 9.11 to admit evidence that his formal PTSD diagnosis did not occur in time to be filed as evidence on summary judgment. Apparently there is no dispute to this timing, as the Court deemed it was not necessary to admit such clarification evidence and denied the RAP 9.11 motion. See RAP 9.11 Motion, Motion to Modify Commissioner's Ruling, and Reply to Motion to Modify.

claims based upon its argument that there were no damages. Appellants made a factually undisputed showing of damages. The trial court was not permitted to diminish or disregard this evidence on summary judgment. On a motion for summary judgment, courts do not weigh evidence or assess witness credibility. Barker v. Advanced Silicon Materials, LLC, 131 Wn.App. 616, 624, 128 P.3d 633 (2006). "[The court's] job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met." Id. (quoting Renz v. Spokane Eye Clinic, P.S., 114 Wn.App. 611, 623, 60 P.3d 106 (2002).

Therefore, because emotional distress and other damages are available to the Appellants under the intentional tort claims as a matter of law, and because Appellants met their production burden of making a prima facie showing of emotional distress and other damages, the issue of damages is properly left to be decided by a jury.

3. No Mitigation of Damages Was Required

To the extent that JPay argued on summary judgment that the Appellants were required to attempt to mitigate their damages by accepting an inferior "JP4" device, this is incorrect. "The requirement of minimizing damages does not apply to cases of intentional or continuing torts," and "[a]lthough damages must be mitigated in most cases, damages resulting from an intentional tort need not be." Public Util. Dist. of Pacific County v.

Comcast, 184 Wn.App. 24, 76, 77, 336 P.3d 65 (2014) (quoting Desimone v. Mut. Materials Co., 23 Wn.2d 876, 884, 162 P.2d 808 (1945)).

G. The Trial Court Erred In Granting Summary Judgment Dismissal of Appellants' UDJA Claims

Appellants sought a declaratory judgment to establish whether they were entitled under JPay's vendor contract to have prices of music purchases from JPay to be "comparable to cost from major providers such as iTunes." JPay moved for summary judgment dismissal of this declaratory judgment claim, arguing that "the price per song is clearly and unambiguosly listed beside each song that is available for download," and that if Appellants did not like JPay's prices for music, "they can use their mp3 player to listen to FM radio stations if they do not want to pay for songs."[8] CP 106. JPay argued that while Appellants claimed they were promised song prices comparable to iTunes, they "have not presented evidence of such a promise." CP 106.

The trial court granted summary judgment dismissal of this claim, only stating that, "the court is finding that this is not an appropriate case for a declaratory judgment...[because] it's very difficult for court actions to proceed when somebody is complaining about the malfunction of a product that's well beyond its warranty." RP 45. As is apparent, the trial court

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[8] This, of course, is belied by the fact that JPay locked Appellants' JP3 devices so not even the FM radio would function.

never addressed the declaratory judgment claims that pertained to the music overcharging practices.

The Superior Court has original jurisdiction over Appellants' claims for declaratory judgment and injunctive relief. RCW 2.08.010; RCW 7.24.010; RCW 7.40.010; Art. IV, §6 Wash. Const.; see Casey v. Chapman, 123 Wn.App. 670, 676, 98 P.3d 1246 (2004)("There is no doubt here that the superior court [has] subject matter jurisdiction in this declaratory judgment action.")

The Uniform Declaratory Judgment Act (UDJA) provides that:

> "a person whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

RCW 7.24.020 (emphasis added).

Unless a dispute involves "issues of major public importance, a justiciable controversy must exist before a court's jurisdiction may be invoked under the [UDJA]." League of Educ. Voters v. State, 176 Wn.2d 808, 816, 295 P.3d 743 (2013)(citations omitted). A justiciable controversy under the UDJA requires four elements:

> "(1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interest that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P.2d 359 (1990).

Here, Appellants' claims meet all four criteria for a justiciable controversy. (1) Appellants contend Contract No. K8262 requires the prices for music sales to inmates to be "comparable to cost from major providers such as iTunes." JPay states there was no such contractual obligation, and that Appellants did not show "evidence of such a promise." Thus, an actual dispute exists. (2) Appellants and JPay have genuine and opposing interests; JPay wants to charge more money for songs and the Appellants believe the contract requires song prices to be less than JPay is charging. (3) The parties' interests are direct and substantial. (4) A judicial determination will be final and conclusive.

Appellants seek a judicial determination of their rights, status, or other legal relations under WDOC/JPay Contract No. K8262 ("Contract"). This is a pure question of contract law as to a third-party beneficiary's rights to have music prices be comparable to iTunes or other major providers, as expressly stated in the Contract. The UDJA allows for an "interested person to request resolution of any question arising under the validity or construction of a contract so long as the UDJA's underlying requirements are met." Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004).

The creation of a third-party beneficiary agreement requires that the parties intend, at the time they enter into the agreement, that the promisor assume a direct obligation to the

beneficiary. Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn.App. 229, 255, 215 P.3d 990 (2009). "If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract and hence the parties thereto, contemplate a benefit to the third person." Id., at 255-56. "The test for intent is an objective one -- whether performance under the contract would necessarily and directly benefit that party." Id., at 256. "The contracting parties' intent is determined by construing the terms of the contract as a whole, in light of the circumstances under which it is made." Id.

Here, the sole basis for the contract between JPay and the Washington Department of Corrections is for the WDOC inmates to be able to purchase digital media content from JPay. As the Contract plainly states, "[JPay] is in the business of providing MP3, E-mail and other services to incarcerated offenders and their families. In response to solicitation, [JPay] submitted its response to provide certain services for DOC offenders." CP 424. As further stated in the contract, "[JPay] agrees to: (a) make available to offenders MP3 players, Music Downloads and E-mail." CP 425. Therefore, the first issue which Appellants are entitled to a declaratory judgment on is whether they are a third-party beneficiary to Contract No. K8262.

The second issue which Appellants seek a declaratory judgment on is whether the terms of Contract No. K8262 entitle Appellants

to music purchases from JPay that are priced comparable to iTunes or other retail providers. By the clear language of the Contract it states, "Contractor agrees to provide to DOC, the following services"...(6) Operations - Digital media purchases are comparable to cost from major providers such as iTunes." CP 304-309. The Contract reiterates this agreement in stating, "Song and music video prices are also comparable to suggested retail prices from the record labels." CP 308-310. It must be noted that while JPay improvidently argued that this language is merely from a "proposal" and not the actual contract (CP 92, 520), the language is clearly identified as being in "Appendix 2.01" and "Appendix 3.01" of Contract No. "K8262". CP 305-310.

Therefore, while the Contract establishes that songs can cost between $0.99 and $2.00 each (CP 308-310), the other language in the Contract assures that the price for any music item will be comparable to the cost for the same item from other major providers such as iTunes. The language in both of these sections must be given effect and harmonized with each other.

Courts generally interpret the language of a contract as written, giving each term its ordinary, usual, and popular meaning unless the entire contract demonstrates that the parties had a contrary intent. Hearst Comunications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Courts interpret contracts to give effect to each provision and to harmonize contract terms that seem to conflict. Nishikawa v. U.S. Eagle High, LLC, 138 Wn.App. 841, 849, 158 P.3d 1265 (2007).

Giving full effect to and harmonizing this language means that while JPay may very well be permitted to charge $2.00 for a song, it cannot do so if the same song is selling for considerably less on iTunes or another online retailer. If a song that Appellant Kozol bought from JPay for $1.99 was being sold on iTunes for 79¢, JPay's prices would not be "comparable" to iTunes, as promised.

As the undisputed evidence in the record shows, a previous investigation into JPay's nationwide retail practices exposed that JPay's music prices "can cost 30% to 50% more than they would on iTunes." CP 185. Because Appellants meet the criteria for UDJA review, it was improper to dismiss the UDJA claims. JPay did not establish than no such language existed in the contract, nor did JPay show beyond a genuine dispute that its prices were comparable to iTunes or other online music providers. The genuine dispute of material fact as to these issues precluded summary judgment dismissal.

Further, this is also an actual and substantial issue of major public importance, as there exists potentially millions of dollars of widespread music overcharging by JPay as pertains to WDOC inmates and their families. As just one example, Appellant Kozol purchased approximately 1,700 song downloads from JPay. If the exact same songs cost 50% less on iTunes, Mr. Kozol could be entitled to a refund of the overage amount which would be several hundred, or even a thousand dollars.

There are currently more than 17,000 inmates within the WDOC. ER 201. This issue is significant.

While JPay's argument was centered around the assertions that "the price per song is clearly and unambiguously listed beside each song that is available for download"[9] (CP 106), and that the Appellants "did not have to download content if they believed the prices were too high" (CP 521), the undisputed evidence in the record refutes this, and shows that Appellants did not come to possess the JPay Contract No. K8262 until March 2015, well after all of these overcharged purchases occurred. CP 269-271 (¶ 11). Appellants had no way to comparison shop on iTunes or other online providers because they are incarcerated with no direct access to the internet. CP 270-272 (¶ 14). Mr. Kozol has been in prison since before online music purchases and digital music players became widely available in the consumer marketplace. CP 460-461. Ergo, there is no evidence showing Appellants knew they were being overcharged.

Contrary to its assertions, JPay failed to establish beyond a genuine dispute that Appellants knew they were paying overcharged prices based upon Contract No. K8262, and JPay has failed to establish actual assent, apparent assent, constructive assent, express assent, implied assent, or mutual assent to paying knowingly overcharged music prices.

Viewing all facts in the light most favorable to Appellants, there exists a genuine issue of material fact as to whether

[9] There was no evidence of such a fact filed by JPay below.

Appellants are third-party beneficiaries under Contract No. K8262, and whether the Contract requires JPay's prices for any specific music to be "comparable to cost from other major providers such as iTunes" and "comparable to suggested prices from the record labels." Accordingly, it was improper to grant summary judgment dismissal of Appellants' UDJA claims.

H. The Trial Court Erred In Denying Appellants' Motions To Compel Discovery And For A CR 56(f) Continuance

A trial court's denial of a motion to compel or a CR 56(f) motion for continuance are reviewed for an abuse of discretion. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 183, 313 P.3d 408 (2013). "A court abuses its discretion when it bases its decision on unreasonable or untenable grounds." Clark v. Office of Atty. Gen., 133 Wn.App. 767, 777, 138 P.3d 144 (2006).

1. CR 56(f) Continuance

JPay argued that it was entitled to summary judgment dismissal of Appellants' CPA, conversion, and trespass to chattels claims because it did not intentionally send a computer command to the Appellants' JP3 devices to render them "locked" and "Property of JPay - Unassigned." Instead, JPay offered a purely speculative assertion that the injury to Appellants' chattel may have been caused by some sort of unidentified glitch or bug in the JPay operating software. As established earlier in this appellate briefing, JPay's sole evidence, the Declaration of

Shari Beth Katz, is wholly speculative and establishes nothing probative as to whether the injuries were caused inadvertently or intentionally, and therefore is deficient for summary judgment purposes. See Opening Brief of Appellants Ballesteros, Craig and Blair, at 31-38.

It is undisputed that if Appellants are able to prove that JPay intentionally sent a command to "lock" and "unassign" their JP3s, then JPay would not be entitled to summary judgment dismissal of the CPA, conversion, or trespass to chattels claims. As the lead plaintiff, Appellant Kozol moved for a CR 56(f) continuance to conduct specific discovery into the dispositive fact of whether the JP3 devices were intentionally sent a command to lock them. CP 124-130.

In response to the motion, JPay made the specious argument that "[r]eviewing the code will not reflect that the coders intended malfunctions," and that "[t]here is no way to glean intent from looking at code, and Plaintiffs have failed to explain how they intend to determine intent." CP 113, 114. But JPay presented no evidence to support this argument, despite having numerous computer programmers and Information Technology specialists under its employ. Instead, this was merely the argument of counsel, which is not evidence. The rule is well settled - argument of counsel does not itself constitute competent evidence. Lemond v. Dep't of Licensing, 143 Wn.App. 797, 807, 180 P.3d 829 (2008).

JPay's argument is rather obtuse, in that Appellants submitted sworn declaration evidence establishing that expert witnesses would be able to determine whether JPay sent an intentional command to lock the JP3s or whether it was a bug or glitch in the software, by reviewing certain portions of the software commands sent to their specific JP3 devices. CP 227-230, 371-375. While it is undisputed the Appellants' expert is a former Microsoft program supervisor who is well qualified as an expert in this case, JPay's argument took on an illogical demeanor, and stated that "[i]f Plaintiffs are so capable, they could have analyzed their own JP3 players," but then contradicted itself by stating that "[p]laintiffs have failed to explain how they and/or their expert will be able to analyze electronic devices from their prison cells." CP 119. Moving past the somnolence of JPay's sophistry, there was every reason to grant the CR 56(f) continuance.

First, the undisputed facts in the record establish that the JP3 devices are configured "to prevent the player from being connected with an unauthorized application" and are "unable to connect to any machine other than the offender kiosk." CP 430. Therefore, no facts exist to show Appellants "could have analyzed their own JP3 players...from their prison cells," as JPay claimed. CP 119. Clearly, Appellants could only obtain the necessary evidence by conducting further discovery and deposing JPay.

More specifically, the Appellants needed to conduct this discovery to identify whether JPay sent a specific command to "lock" and "unassign" their JP3 devices. JPay's conclusory and speculative declaration evidence only asserted a software update may have caused "many" JP3 players to malfunction. CP 86. But this evidence is completely devoid of any substance to establish a JPay employee did not intentionally "lock" and "unassign" Appellants' specific JP3 players.

Conversely, the undisputed declaration of Appellants' expert witness established that upon viewing the specific software commands existing on the locked JP3s, he could provide an expert opinion as to whether the JP3s were inadvertently locked due to a software bug, or whether there was an intentional, specific command executed by JPay to lock the devices. CP 227, 230, 371-375. JPay presented no admissible evidence to refute this. Instead, JPay argued that no intent could be gleaned from looking at code. CP 114. But as the declaration of Appellants' expert makes clear, as a high-level software engineer he would be able to determine by reviewing the code commands sent to Appellants' JP3s if JPay intentionally sent a specific command to lock the devices, as JPay employees had stated that they had the ability to intentionally "malfunction" (i.e., lock-up) a customer's media device, which is exactly the sort of digital command that would be an intentional act, rather than an accidental software glitch. CP 229. Software code can show JPay's intent.

There is no dispute that summary judgment dismissal of Appellants' claims would be precluded as a matter of law in the event the Appellants could present evidence that JPay intentionally sent a software command to "lock", "unassign," or "malfunction" their JP3s. There is no dispute that the only way Appellants can access the software code commands on their secure JP3s is to engage the assistance of JPay via document production and deposition questioning. Accordingly, the trial court erred in denying the motion for continuance to obtain the necessary evidence.

2. Motion to Compel Discovery

Appellants noted a CR 30(b)(6) deposition of JPay, but JPay refused to attend. Appellants moved the trial court to compel deposition attendance, and to compel production of requested documents containing software code relating to Appellants' JP3 devices. CP 338-375.

JPay argued that it was not required to appear for the depositions Appellants noted to be conducted in Washington State, as this would be "overly burdensome and expensive." CP 120-121. JPay also argued that the requested software code was protected by privilege. CP 119, 121-122. But the Appellants were entitled to this discovery, and a protective order would resolve any concerns had by JPay. As such, the trial court erred in denying the motion to compel.

First, JPay conceded that it would "[go to the prison] with the papers in our possession and [let] them look at [software data] while we watch and keep control over those documents." RP 13. Based upon this, and in light of the parties' ability to enact a protective order as may be necessary to protect any secure information, JPay's newfound willingness to produce the discovery to the Appellants -- once the motion to compel was brought -- supported the granting of the motion to compel.

Second, the only means by which Appellants could obtain the necessary evidence of whether JPay employees sent a specific, intentional software command to "lock" or "malfunction" their JP3 devices, was for JPay to provide a physical way for the Appellants and their expert witnesses to plug the JP3s into JPay's operating system to access the software commands received on the JP3s.

While JPay argued that it should not have to send CR 30(b)(6) deponents to Washington, and that the Appellants could obtain the necessary evidence over the telephone (CP 121; RP 14), this is untenable because the only way for Appellants to view the specific software commands existing in situ on their JP3s -- i.e., the only way to diagnose what caused the JP3s to lock -- is for JPay to provide physical access to the JP3s. According to JPay, the JP3s can only be accessed from a JPay "secure kiosk or secure network." CP 305. The JP3s are "unable to connect to any machine other than the offender kiosk." CP 306.

Due to the security designs of the JP3s, it was completely reasonable and entirely necessary that

> "JPay's CR 30(b)(6) designees will be requested to bring a laptop computer that is networked to JPay's servers and operating system so as to allow review of the computer commands specifically sent to each JP3 device at the time it became "locked.'"

CP 340. But such discovery cannot occur over the telephone. Id. Despite JPay's sweeping protestations that "[t]hat's not how depositions typically work" (RP 14), this is precisely how depositions operate when coupled with a subpoena duces tecum or CR 34 request. Otherwise, no discovery would ever be had in a case where evidence is maintained in electronic format or involves the operation of electronic hardware.

Even if there was a way to access the secure JP3's data on their own, the Appellants have no access to computers or the internet, because they are in prison. They cannot plug the JP3s into a computer link at the prison for a JPay representative deponent to simultaneously view in Florida, and then telephonically question the deponent about the data. Upon the circumstances of this case, the only way for Appellants to question JPay's representatives about the in-situ data on the JP3s is by way of in-person deposition questioning with the requested duces tecum/CR 34 productions.

Appellants clearly designated in their request for documents and tangible objects at the noted depositions to include the "features available to remotely access and service JP3[s]," and

"programs and features of the software." CP 350-351. In fact, while the Appellants maintained chain of custody of the evidence (the JP3 devices with the in-situ data) so JPay would not simply erase the electronic evidence of its tortfeasance (CP 441), JPay argued it would need to get physical access to the JP3s. RP 31. It is therefore obvious that a deposition is the necessary mechanism for JPay to be questioned about what actually affected the JP3 players.

Third, JPay argued there was no basis in law for it to have to appear for in-person depositions in Washington. CP 355, 120-121. Appellant Kozol notified JPay that it misunderstood the law. CP 357-359. JPay also unfoundedly claimed that attending depositions would be unduly burdensome. CP 120-121. But these arguments are specious.

A failure to make discovery may not be excused on the ground that the discovery is objectionable unless the party failing to act has applied for a protective order under CR 26(c). See Sigliano v. Mendoza, 624 F.2d 309 (9th Cir. 1981). Here JPay failed to move for a protective order, and should not be permitted to evade discovery. Appellants' motion should have been granted.

A protective order may be sought to protect an out-of-state party from being required to attend a deposition within the state. Prior to adoption of the civil rules, the rule in Washington was that the deposition of an out-of-state defendant had to be taken at his or her place of residence. State ex rel. Onishi

v. Superior Court, 30 Wn.2d 348, 355-56, 191 P.2d 703 (1948). After adoption of the civil rules, the court of appeals in Campbell v. A.H. Robins, Co., 32 Wn.App. 98, 106, 645 P.2d 1138, review denied, 97 Wn.2d 1037 (1982), indicated that Onishi was no longer valid law, asserting that Onishi had been overruled sub silentio in Allen v. American Land Research, 95 Wn.2d 841, 631 P.2d 930 (1981).

While Campbell involved an appearance at trial pursuant to CR 43(f)(1) rather than a deposition, CR 30 and CR 43 make it abundantly clear that the same rules apply to a request to a party (or managing agent) to appear for deposition testimony taken under the jurisdiction of the superior court for this action. Deposition attendance is required under CR 30 and CR 43(f)(1). Washington Civil Procedure Deskbook (Wash. St. Bar Assoc. 2d ed. 2002 & Supp. 2006), §26, pg. 76.

Further, there is no question that a party can be compelled by notice to appear for a deposition. Service of a subpoena is not required on a party. CR 37(d) provides for sanctions if a "party or an officer, director, or managing agent of a party...fails...to appear before the officer who is to take his deposition, after being served with a proper notice...." CR 37(d). This sanction sufficiently makes clear that a party's attendance is required by a notice of deposition.

Finally, JPay's business within Washington State is conducted pursuant to the terms of Contract No. K8262, in which JPay

expressly agreed that it "shall comply with all federal, state and local laws." CP 427. As such, JPay cannot duck and dodge from Washington law and the Civil Rules of Superior Court requiring deposition attendance upon being served with a notice of deposition. Ultimately, however, JPay's failure to seek a protective order precluded its argument objecting to the noted depositions.

And while CR 26(b)(1) provides that a protective order can be used to regulate the extent of discovery if "the discovery is unduly burdensome or expensive, taking into account the needs of the case," here, not only did JPay fail to seek a protective order, but there was no showing that the depositions would be unduly burdensome or expensive. It is undisputed that JPay continuously sends its employees to Washington Department of Corrections prison facilities. CP 9-10 (¶ 4.9), 327-330, 176.

JPay most recently sent 4 employee representatives who possessed knowledge of the JP3/JP4/JP5 devices and kiosk system, Messrs. Lyon Dhanukdharrishingh, Lee Posner, Greg Levine, and Jim Markey, to Appellants' prison facility, Stafford Creek Corrections Center on February 18, 2016. CP 176. This makes clear that JPay's counsel falsely lodged its objections of "undue burden and expense" (CP 355), or signed the objection without conducting a reasonable investigation into the truth of the objection asserted or willfully objected to harass, unnecessarily delay or increase the costs of litigation for Appellants. In

truth, JPay could have agreed to depositions being taken of its CR 30(b)(6) representatives on February 18, 2016, when they were already going to be at the prison. These mendacious, sham objections are simply a continuation of JPay's flagrantly unscrupulous business ethos. And JPay should not seriously be heard to complain about minimal costs to attend depositions, when it openly flouts spending gobs of money to woo and cater to corrections officials, and its CEO enjoys a lavish lifestyle that includes a million-dollar mansion on a private island and a luxury motoryacht, while impoverished customers continue to be subjected to JPay's unfair tactics. CP 186-195. Even the "American Dream" has its limits, and cannot avoid Appellants' discovery requests.

The final roadblock thrown up by JPay to prevent disclosure of its liability was its improvident argument that JPay's computer programs and devices are subject to trade secret protection. CP 121-122. While this argument may have superficial appeal, it rings hollow upon actual examination.

JPay argued that any commands to "lock" and "unassign" Appellants' JP3 devices is a trade secret under the definition in RCW 19.108.010(4). CP 121-122. But JPay presented zero evidence to establish its software code met the elements of RCW 19.108.010(4), instead presenting the mere arguments of counsel that, "[c]ertainly, JPay's computer programs and devices are subject to trade secret protection." CP 122. Again, counsel's

argument is not evidence. Lemond, 143 Wn.App. at 807. Under the authorities cited to by JPay below, the specific, limited lines of software code sought by Appellants would have to be proven to have independent economic value, and not be readily available to others who could obtain economic value from its use. RCW 19.108.010(4). JPay failed to establish this.

The undisputed evidence shows JPay is exclusively "in the business of providing MP3, E-mail amd other services to incarcerated offenders." CP 424. Per Contract No. K8262, JPay has no competitors to its revenue base under the exclusive contract. JPay was the sole manufacturer of its proprietary JP3 device, and does not sell any model mp3 players or music downloads outside of the prison environment to customers in the mainstream marketplace (as nobody in the open marketplace would pay such outrageously high prices, nor would want such outdated technology). More importantly, the JP3 devices are no longer manufactured and are completely discontinued. CP 86. Upon these undisputed facts, the Appellants looking at a few lines of computer code to learn what "locked" and "malfunctioned" their JP3s will not reveal any competitive trade secret that could be used by a competitor.

With JPay agreeing to show the code to Appellants and their experts under supervision and control of JPay's counsel (RP 13), and with an appropriate protective order in place, there could

be no reveal of trade secrets to competitors. In fact, the JP3 software is an open-source, unix-based platform called "C language" (CP 362, 529 - ROG No. 7), which JPay CEO Ryan Shapiro described as "[w]e take outside applications, redevelop them for prisons specifically, and then deploy them." CP 174. Viewed in the light most favorable to Appellants, there can be no proprietary nature to a software command to "lock" or "malfunction" their JP3 devices, when the underlying software consists of open-source "outside applications" that are not exclusive to JPay and that can be accessed and utilized by virtually anyone.

But more specifically, JPay failed to submit any evidence to establish how a computer command to "lock" or "malfunction" their JP3s would enable a competitor to "obtain economic value from its disclosure or use." RCW 19.108.010(4). With no one but JPay being able to access the software code on its JP3 devices, with no one being able to compete with the JP3 devices because of JPay's exclusive contract with the WDOC, and with the JP3s having now been discontinued and no longer manufactured or sold, it is hard to imagine a scenario in which any "lock" or "malfunction" software command could be a potential trade secret.

The evidence Appellants seek is merely some limited data on a piece of computer equipment (owned by them) that is no longer manufactured, sold, serviced, or supported by its retailer, JPay. Based upon JPay's continuous practices of "locking" and

"malfunctioning" prior models of mp3 players to force customers to purchase the newest model devices (CP 231-236), Appellants believe that discovery will develop evidence that JPay intentionally sent software commands to "lock" and "malfunction" their JP3 devices.

Notably, in its oral ruling, the trial court stated that,

> "if I deny summary judgment on some of the claims as requested [...] and the case is still open, it would be my recommendation that a couple of depositions of JPay officials that have knowledge of the system, the JPay3s and JPay4s and how they interact with the kiosk, that these be the first step...."

RP 16. This makes manifest the untenable nature of the trial court's denial of the motions to compel and for continuance.

The Appellants can only prove that JPay intentionally "locked" and "malfunctioned" their JP3 devices by obtaining a continuance to conduct discovery, and by the court compelling specific discovery and deposition attendance. The trial court ruled that these depositions sought by Appellants would be a logical next step, in the event summary judgment was denied. But because Appellants could not show on summary judgment that JPay intentionally "locked" or "malfunctioned" their JP3s, the court accepted JPay's conclusory evidence that the lock-ups were accidental, and granted summary judgment dismissal of the claims in favor of JPay.

This circuitous logic is untenable. In one breath the trial court recognized the need for discovery to sustain Appellants'

claims, yet in the next breath it dismissed the claims based upon the express lack of proof thereof.

I. The Trial Court Erred In Denying Reconsideration

1. Evidence Filed on Reconsideration

"Under CR 59(a)(4), reconsideration is warranted if the moving party presents new and material evidence that it could not have discovered and produced" previously. Wagner Dev. Inc. v. Fid. & Deposit Co. of Md., 95 Wn.App. 896, 906, 977 P.2d 639 (1999). If evidence was available but not offered until after the opportunity passed, the party is not entitled to submit the evidence. Id., at 907.

Appellants presented new evidence in their Motion for Reconsideration.[10] CP 157-242. The record on review makes clear that Mr. Kozol had all legal materials in his possession - including evidence in this case - seized from him, which was counted as fourteen bankers boxes of documents. CP 70-71, 75. The undisputed record shows that numerous pieces of evidence in this case were still not returned to Mr. Kozol, including but not limited to some that he previously identified. CP 71-72. Mr. Kozol identified in the summary judgment hearing that he

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10 JPay argued that the evidence was not new for purposes of CR 59(a)(4). CP 495-499. However, the trial court's Order denying reconsideration on March 28, 2016 did not specify whether the evidence failed to comport with CR 59(a)(4). Because the denial of reconsideration in this case is part of this Court's de novo review of summary judgment, the facts viewed in the light most favorable to Appellants show the evidence was new for purposes of CR 59(a)(4).

still did not have all of the legal materials/evidence returned to him as of the time of summary judgment on February 26, 2016. VRP, at 6.[11]

Therefore, viewing these facts and inferences in the light most favorable to Appellants, their evidence on reconsideration could not have been presented earlier on summary judgment, and was "new" for purposes of CR 59(a)(4).

Evidence appearing at Attachments A, B, D, E, F, G, H, I, and K of the Declaration of Steven Kozol (CP 166-174, 179-212), Attachment A of the Declaration of Keith Blair (CP 216-217), and the Declaration of Jesus Garcia-Pena and the Declaration of Lennie Cain (CP 237-242), could not have been presented within the time requirements of CR 56(c) in response to JPay's summary judgment motion. This evidence was seized from Mr. Kozol and was not returned to him until after summary judgment had been granted.

Evidence Appearing at Attachments C and J of the Declaration of Steven Kozol (CP 175-178, 209-210), could not have been presented in time to respond to JPay's summary judgment motion. The public statements made by JPay in Attachment C were not made until February 18, 2016 (CP 176) and thus could not have been

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11 While Kozol filed a Motion to Reschedule Summary Judgment Hearing based upon the seizure of files/evidence in this case (CP 62-75), he orally withdrew the motion because he had also moved for a CR 56(f) continuance, which would also have allowed him enough time to have regained possession of the remaining seized evidence by March 6, 2016 (as filed on reconsideration), and thus the evidence would have been timely filed as part of summary judgment.

filed 11 days before the hearing date of February 26, 2016. The evidence appearing at Attachment J was not created and obtained until March 1, 2016, and is new evidence. CP 210.

The Declaration of Ansel Hofstetter (CP 231-233) did not exist and was not obtained until after summary judgment was entered on February 26, 2016, and therefore is new evidence.

The Declaration of John Shefcik (CP 226-230) could not have been presented in response to JPay's summary judgment motion, as the declaration is largely based upon the content of e-mail evidence describing JPay's ability to "Malfunction" JP3 devices. This e-mail evidence (CP 217) was seized from Mr. Kozol and was not returned to him until after summary judgment was entered, so it could not have been shown to Mr. Shefcik in time for him to review and incorporate into the declaration no later than 11 days prior to the February 26, 2016 hearing date.

The Declaration of Larry Ballesteros (CP 219-221) presents specific new evidence establishing his recently diagnosed mental ailment of Post Traumatic Stress Disorder (PTSD) that he had been suffering from for decades, which was a contributing factor to the specific emotional distress suffered by Mr. Ballesteros as a result of JPay's actions in this case. Mr. Ballesteros was not formally diagnosed with PTSD until after Appellants filed their response to JPay's summary judgment motion, and thus this diagnosis was not available to be presented on summary judgment and is new evidence under CR 59(a)(4).

Additionally, the declarations of each Appellant specifically presented new evidence of emotional distress that they suffered in the time after summary judgment was granted to JPay. CP 164 (¶ 16), 215 (¶ 4), 220-221 (¶ 3), 224 (¶ 3). As evidence of emotional distress occurring after summary judgment it is "new" evidence under CR 59(a)(4).

Viewing all facts and inferences most favorably to Appellants as the party opposing summary judgment, this evidence was not available to be filed on summary judgment. All of this evidence comports with CR 59(a)(4), and it should be fully considered in this Court's de novo review of the summary judgment issues.

2. Issues Raised on Reconsideration

As established earlier in Appellants' briefing, issues of law raised in a CR 59 motion are reviewed de novo. Allyn, 87 Wn.App. at 727; Detrick, 73 Wn.2d at 812. Evidence filed on reconsideration of a summary judgment is properly a part of the appellate court's de novo review. Rodriguez, 158 Wn.App. at 728; Tanner, 128 Wn.2d at 675 n.6; Folsom, 135 Wn.2d at 663.

Accordingly, Appellants' arguments on the issues raised on reconsideration have been incorporated on appeal into their arguments of the summary judgment issues, and in the interest of judicial economy are not presented a second time in this section. For all reasons raised on reconsideration, summary judgment should have not been granted in favor of JPay.

J. Appellants Should Be Awarded Reasonable Costs on Appeal

Pursuant to RAP 18.1 and Title 14, Appellants ask that they be awarded all costs/expenses/fees in litigating this appeal. A party is entitled to costs/fees on appeal if a contract, statute, or recognized ground in equity permits recovery of costs/fees at trial, and the party is the substantially prevailing party on appeal. Hwang v. McMahill, 103 Wn.App. 945, 954, 15 P.3d 172 (2000).

The Consumer Protection Act allows a person harmed under the statute "to recover...the costs of the suit, including reasonable attorney's fees." RCW 10.86.090. Where a party successfully sues for the recovery of converted goods, he is entitled to costs. Mansfield v. First Nat'l Bank, 6 Wash. 603, 34 P.143 (1893). Costs are allowed for an action to enforce a contract. RCW 4.84.330. Costs are allowed generally for a prevailing party to recover. RCW 4.84.030, .080; see Whidbey Gen. Hosp. v. Dep't of Revenue, 143 Wn.App. 620, 180 P.3d 796 (2008)(hospital that appealed summary judgment dismissal of its business and occupation tax refund claims was prevailing party when court of appeals reversed summary judgment, and was entitled to its costs under CR 54(d)(1) and RCW 4.84.030). Costs are awardable under RAP 14.2 to the substantially prevailing party on appeal. Satomi Owners Ass'n v. Satomi LLC, 167 Wn.2d 781, 817, 225 P.3d 213 (2009).

Should Appellants prevail in this appeal, it is proper to award them all costs and expenses, to be enumerated in the cost bill.

VII. CONCLUSION

For all the foregoing reasons, Appellant respectfully submits that the trial court erred in denying the motion to continue and to compel, and that the court erred in granting summary judgment dismissal of Appellant's CPA, conversion, trespass to chattels, UDJA, and injunctive relief claims. This appeal should be granted.

RESPECTFULLY submitted this 3rd day of December, 2016.

STEVEN P. KOZOL
Appellant
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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, LARRY BALLESTEROS, declare and say:

That on the 3rd day of December, 2016, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 48888-4-II:

Opening Brief of Appellant Steven P. Kozol;

;

;

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addressed to the following:

Clerk of the Court	John A. Kesler III
Washington Court of Appeals	Bean, Gentry, Wheeler &
Division II	Peternell, PLLC
950 Broadway, Suite 300	910 Lakeridge Way,S.W.
Tacoma, WA 98402	Olympia, WA 98502

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 3rd day of December, 2016, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Larry Ballesteros
Print Name

DOC# 847194 UNIT# H6-A91
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520